IN THE COURT OF APPEALS OF THE STATE OF TENNESSEE
EASTERN SECTION AT KNOXVILLE

STATE OF TENNESSEE, ex rel. ROBERT E. COOPER, JR., in his official capacity as the Attorney General And Reporter of Tennessee and JAMES H. FYKE, Commissioner of the Tennessee Department of Environment and Conservation,	)	
Plaintiffs-Appellants,	)	
v.	)	No. E2007-02424-COA-R3-CV
	)	Hamilton County Chancery
LAHIERE-HILL, LLC,	)	
Defendant-Appellee.	)	

BRIEF OF STATE APPELLANTS

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1. Did the Trial Court err in its construction of the scope of the mineral reservation in the 1951 deed by failing to construe its language most strictly against the grantor, thereby allowing the mineral owner (Lahiere-Hill) the right to destroy the surface through the extraction of rocks and stone?

2. Did the Trial Court err in both dismissing the State's public nuisance claim as a matter of law and dissolving the temporary injunction by finding that Lahiere-Hill's mineral rights under the 1951 deed were so broad that they essentially extinguished the State's rights to any protection of the surface estate?

STATEMENT OF THE CASE

This action was initiated on February 22, 2007, with the filing of a verified complaint for ejectment, trespass, and injunctive relief to abate a public nuisance by the State of Tennessee, upon relation of the Attorney General and Reporter for the State of Tennessee and the Commissioner of the Tennessee Department of Environment and Conservation ("State"), against Lahiere-Hill, LLC ("Lahiere-Hill") and Marty Daggett ("Daggett"). (Vols. I-III, 8-306).[1] The State simultaneously filed a motion for temporary injunction to enjoin Lahiere-Hill and its contractor, Daggett, from continuing to remove stone from the Cumberland Trail State Park ("CTSP") in Hamilton County, Tennessee. (Vol. III, 307-317).

On March 21, 2007, after receiving assurances from counsel for Lahiere-Hill regarding ownership of the mineral interests at issue,[2] the State amended its complaint to add an action for declaratory judgment under Tenn. Code Ann. §§ 29-14-102 and -103 to determine the rights of the surface owners and mineral owners in the same real property. (Vol. III, 322-324).

The Trial Court held an evidentiary hearing on the motion for temporary injunction on March 21, 2007 (Vol. V), and subsequently issued a Memorandum Opinion and Order on April 4, 2007, denying the State's request to enjoin defendants temporarily from any harvesting of stone on the

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[1] The record on appeal consists of the following: a four volume technical record; a one volume transcript of a temporary injunction hearing; a one volume deposition with an attached exhibit volume; and one volume of exhibits 1-20 introduced at the injunction hearing. References to the technical record or the transcript of hearing will be made by the roman numeral of the volume number followed by the page number(s) therein. References to the hearing exhibits will be made by the designation "Ex." followed by the exhibit number and any references to the deposition and attached exhibits will be made by the designation "Depo." followed by the page number therein or the exhibit number attached.

[2] At the time of filing the initial verified complaint, the State also served defendant Lahiere-Hill, LLC with interrogatories for the express purpose of attempting to determine the actual identity of the individuals or entity(ies) who had an ownership interest in the mineral estate at issue.

CTSP, but temporarily enjoining Lahiere-Hill and Daggett from using mechanized machinery to harvest stone in the area between 25 and 50 feet from the nearest edge of the Cumberland Trail proper, and from harvesting any stone by any means within 25 feet of the nearest edge of the Trail. (Vol. III, 332-351).

On March 28, 2007, Lahiere-Hill filed a motion to dismiss the State's complaint (Vol. III, 328-329), and on March 29, 2007, defendant Daggett also filed a motion to dismiss, adopting and incorporating the motion to dismiss filed by Lahiere-Hill. (Vol. III, 330-331). On May 14, 2007, after a hearing held on April 16, 2007, the Trial Court entered an Order denying both defendants' motions to dismiss, finding that the State had stated causes of action that met the motion to dismiss standard. (Vol. III, 355-356). On May 17, 2007, Lahiere-Hill filed an answer to the complaint (Vol. III, 357-367), and on May 24, 2007, Daggett also filed an answer. (Vol. III, 368-369).

The parties entered into an Agreed Scheduling Order on May 11, 2007, setting the case for trial on August 27-28, 2007. (Vol. III, 352-353). This scheduling order was revised on June 26, 2007, to reflect a discovery deadline of July 27, 2007. (Vol. III, 419-421). On June 22, 2007, Lahiere-Hill and Daggett filed a joint motion for summary judgment, relying solely on the evidence adduced at the temporary injunction hearing in March 2007. (Vol. III, 370-418). On August 1, 2007, the State and defendant Daggett entered into a Consent Order and Dismissal under Tenn. R. Civ. P. 54.02. (Vol. III, 446-448).

The Trial Court held a hearing on Lahiere-Hill's motion for summary judgment on August 6, 2007, and entered a written Memorandum Opinion and Order on August 17, 2007, granting the defendant's motion for summary judgment and dismissing the State's amended complaint. (Vol. IV, 501-527). On September 14, 2007, the State filed a motion to alter or amend judgment, specifically

requesting that the Trial Court reconsider its ruling on the State's public nuisance claim, particularly in light of additional evidence that was produced after the State responded to defendant's motion for summary judgment. (Vol. IV, 528-552). This motion was heard on October 1, 2007, and the Trial Court issued a Memorandum Opinion and Order on October 12, 2007, denying the State's motion to alter or amend and reinstating the Trial Court's Memorandum Opinion and Order of August 17, 2007. (Vol. IV, 556-577).

The State timely filed a notice of appeal to this Court on October 26, 2007 (Vol. IV, 578-579), along with a motion for stay under Tenn. R. Civ. P. 62.06. (Vol. IV, 580-584). The State was specifically seeking a limited stay of the final judgment during the pendency of this appeal through a reinstatement of the terms imposed by the Court's temporary injunction Order of April 4, 2007. By Order entered November 8, 2007, the Trial Court denied the State's motion for such a stay. (Vol. IV, 593-594).

STATEMENT OF THE FACTS

This lawsuit arises out of a dispute as to whether Tennessee grantors reserved the right to surface mine stone and rock when they conveyed the surface rights to several tracts of land in 1951. The severance of the mineral and surface rights occurred when Durham Land Company ("Durham") and C. W. Hoffman and his wife Claudia Hoffman ("Hoffman") conveyed title to the surface rights in certain tracts of property in Rhea, Hamilton, and Bledsoe Counties to Efim Golodetz in August 1951, excepting from each of the tracts the following interest:

> [Durham/Hoffman] hereby also expressly saves and excepts out of the property hereinabove described and from the grant hereby made, and reserves to itself, its successors and assigns, all mines, coal, iron, oil, gas, and other minerals, of whatsoever kind or character in and under said above-described property, with full and free power to take all usual, necessary and convenient means for searching for, mining, working, getting, preparing, carrying away, and disposing of said mines and minerals; and excepting all existing public roads and the easements of public utility companies across said above-described property; and excepting and reserving to [Durham/Hoffman] full and free rights and liberty at all times hereafter in and to rights of way over and across said above-described property for ingress and egress for all purposes connected with the use, occupation, and enjoyment of the property and rights hereinabove saved, excepted and reserved.

(Vol. I, 31-32). This deed, which included the conveyance of the "Deep Creek Tract" in the third civil district of Hamilton County, was recorded in Book 1064, Page 46, of the Register's Office in Hamilton County, Tennessee, on August 28, 1951. (Vol. I, 50).

Thereafter, Durham conveyed "all mines, minerals, and mining rights *under* the surface" and "all other rights of whatsoever extent, kind and character" contained in the deeds to certain of its tracts in the third civil district of Hamilton County to Joseph Lahiere on December 7, 1962. (Vol. II, 258-263) (Emphasis supplied). This deed was recorded December 12, 1962 in Book 1517, Page 166 of the Register's Office in Hamilton County. (Vol. II, 263).

In 1963, Joseph Lahiere and his wife acquired additional tracts of real property in fee, as well as mineral rights, located in the third civil district of Hamilton County from Durham and Mary Glen Land Company. (Vol. II, 264-280). This deed, recorded in Book 1559, Page 354, of the Register's Office in Hamilton County on December 5, 1963, included the mineral rights only to the "Deep Creek Tract" described in the original 1951 deed. (Vol. II, 280).

In 1973, Elmer C. Hill, on behalf of a trust, purchased a 40% interest in the mineral rights to the same tracts previously conveyed to Joseph Lahiere by Durham in 1962 and by Durham and Mary Glen Land Company in 1963. (Vol. II, 281-283). This conveyance was recorded at Book 2192, Page 97, of the Register of Deeds Office in Hamilton County. (Vol. II, 283). The Lahieres and Elmer Hill were primarily interested in developing the coal reserves on the property. (Vol. V, 57-58).

By 1990, a statement of claim of ownership of mineral interest was filed, in accordance with Tenn. Code Ann. § 66-5-108, reflecting that the owners of this same mineral interest in real property in Hamilton County were: Elmer C. Hill; Joseph L. Lahiere; Alice Lahiere; Andrea J. Lahiere; Robert C. Lahiere; and the Elmer C. Hill Trust. (Vol. II, 290-292). This statement was recorded at Book 3745, Page 467, of the Register of Deeds Office in Hamilton County. (Vol. II, 292).

Meanwhile, in 1973, Efim Golodetz executed a quitclaim deed to Namarib Timber Corporation ("Namarib") for the surface rights to all of the property conveyed to him by Durham and Hoffman in 1951. (Vol. I, 51-119). This deed is recorded in Book 2142, Page 874, of the Register of Deeds Office in Hamilton County. (Vol. I, 51). Namarib, in turn, then conveyed the same to Hiwassee Land Company in 1974. (Vol. I & II, 120-188). This deed is recorded in Book 2206, Page 803, of the Register of Deeds Office in Hamilton County. (Vol. I, 120). Hiwassee Land

Company later merged into Bowater, Incorporated. (Vol. II, 189).

Between 2001 and 2004, the State of Tennessee acquired certain tracts of real property in the third civil district of Hamilton County from Bowater, Inc., and The Conservation Fund, a nonprofit corporation. (Vol. II, 189-257). These conveyances are recorded, respectively, at Book GI- 6190, Page 18; Book GI- 7405, Page 736; Book GI- 7412, Page 756; and Book GI- 7427, Page 498 of the Register of Deeds Office in Hamilton County. (Vol. II, 189, 201, 211, 234). The property conveyed through these latter deeds comprises about 5,100 acres, consists primarily of surface rights, and includes the area in Little Soddy Creek known as Hotwater Road. [3] (Vol. V, 22, 29; Vol. II, 194; Ex. 1).

After acquiring the aforementioned tracts of real property in Hamilton County, the State incorporated much of that land into the CTSP, Tennessee's only linear park. (Vol. V, 22; Vol. I, 13). This park spans approximately 300 miles and traverses eleven counties in Tennessee. (Vol. V, 28). Construction for the section of the trail located in the Deep Creek and Soddy Creek watersheds of Hamilton County was completed in 2006. (Ex. 2, p. 2). This portion of the CTSP in Hamilton County is home to certain populations of rare and/or federally threatened plant species. (Vol. V, 29-30; Ex. 2, p.2). Specifically, "*scutellaria montana*," a rare plant that is both federally threatened and listed as a "special concern species" under Tenn. Code Ann. §§ 70-8-301, *et seq.*, and "*gelsemium sempirviren*," also a "special concern species" under Tenn. Code Ann. §§ 70-8-301, *et seq.*, are both found in the Deep Creek and Soddy Creek areas of the CTSP in Hamilton County. (Vol. V, 29-30, Ex. 2, ¶ 2). The Soddy Creek gorge is one of the few places in the world where the

[3] References throughout this brief to the "Deep Creek," "Soddy Creek," "Hotwater Road," or "Old Hotwater Road" areas are all references to the same general area of the Cumberland Trail State Park in Hamilton County, Tennessee that is the subject of this action.

federally threatened *scutellaria montana* is found. (Vol. V, 56).

In July 2002, the Lahiere-Hill Partnership entered into a written contract with Danny Hendon ("Hendon") authorizing Hendon "to gather, collect, remove and sell building stone from the Property [in Hamilton County]." (Ex. 12). Hendon subsequently submitted a Notice of Intent ("NOI") to conduct stone removal activities in the area of "Old Hotwater Road" in Hamilton County to TDEC's Division of Water Pollution Control on March 5, 2004, for the purpose of gaining coverage under Tennessee's Multi-Sector Storm Water General Permit for storm water discharges associated with industrial activity (Vol. 2, 298). Shortly thereafter, TDEC issued a Notice of Coverage ("NOC") under the permit to Hendon (Vol. II, 299-301).

At some point, the agreement between the Lahiere-Hill Partnership and Hendon ended, and the Partnership then entered into a written agreement with Marty Daggett to conduct stone removal activities in the same approximate area of Hamilton County.[4] This agreement was effective January 1, 2007, and authorized Daggett to remove "mountain stone and quarry stone from the Property." (Ex. 5). Daggett also submitted an NOI(s) to TDEC, and TDEC granted Daggett coverage under the Multi-Sector Storm Water General Permit for one or more areas of activity in Hamilton County. (Exs. 13 , 14 respectively).

Daggett's stone removal activities differed from Hendon's in that Daggett used larger and heavier equipment, such as bulldozers and backhoes, to extract the stone, whereas Hendon used a skidder to "bust the surface loose." (Ex. 2, ¶ 5 & Vol. V, 33-34). Daggett also built wider roads

[4]At some point thereafter, the Lahiere-Hill Partnership dissolved, and Lahiere-Hill, LLC was formed. The documentation for this is not in the record, other than the allegations in the State's complaint, but the 2007 written agreement between Daggett and Lahiere-Hill reflects that it was entered into by Lahiere-Hill, LLC, a business based in Florida. (Ex. 5).

through forested areas to accommodate his machinery (Ex. 2, ¶ 5 & Vol. V, 33) and sometimes, topsoil, vegetation, and trees had to be removed from the surface in order to dig down to where the sandstone is located. (Vol. V, 76-77).

In January 2007, the State discovered that a portion of the Cumberland Trail in Hamilton County had been disturbed when Daggett's crew constructed one of these roads to access stone. On January 19, 2007, the CTSP Ranger observed that between 50 to 100 yards of trail had been buried beneath fill dirt, tree tops, and scattered debris, all of which he documented through photographs and video. (Ex. 2, ¶¶ 5-6, & photos; Vol. V, 33-37; Ex. 3). TDEC personnel conferred with Daggett after this event and learned that he intended to continue harvesting rocks in the area for at least another year and possibly three. (Vol. V, 40; Ex. 4).

In February 2007, after the damage to the Trail and park property was discovered, park personnel at CTSP received instructions from TDEC's central office in Nashville to close the portion of the Cumberland Trail in Hamilton County in the proximity of defendants' operations to public access. (Ex. 2, ¶ 8; Vol. V, 41-42). This was done in order to avoid the possibility of any harm coming to hikers in the area while the rock harvesting activities were ongoing and heavy equipment was operating in the area. (Ex. 2, ¶ 8; Vol. V, 41-42).

SUMMARY OF ARGUMENT

The Trial Court erred in construing the language of the mineral reservation in the 1951 deed liberally to allow Lahiere-Hill the right to destroy the surface of the CTSP through the extraction of rock and stone. The Trial Court arrived at this holding by incorrectly concluding that the language in the mineral reservation was unambiguous, while, at the same time, consulting recently enacted tax statutes and Attorney General Opinions to infer that the parties to the original deed in 1951 must have intended to include within the scope of the reservation sandstone and virtually any raw material that could be removed from the surface for commercial use. In doing so, the Trial Court effectively held that the State's predecessor in title in 1951 had waived its rights to surface support. These conclusions fly in the face of Tennessee jurisprudence concerning deed construction and mineral rights. *See Campbell v. Tennessee Coal, Iron & R. Co.*, 265 S.W. 674, 676 (Tenn. 1924).

Furthermore, in granting Lahiere-Hill's motion for summary judgment, the Trial Court erred in dismissing the State's public nuisance claim as a matter of law and dissolving the temporary injunction it had issued in April 2007. A public nuisance under Tennessee law is defined as "interference with the public's use and enjoyment of a public place or with other common rights of the public." *Metropolitan Government of Nashville and Davidson County v. Counts*, 541 S.W.2d 133, 138 (Tenn. 1976). The Trial Court summarily dismissed the public nuisance claim, even though Lahiere-Hill offered no evidence in support of either its motion or the reasonableness of its stone removal methods, beyond the very minimal defense presented at the temporary injunction hearing in March 2007. It was uncontroverted at that hearing that between 50 to 100 yards of the Cumberland Trail in Hamilton County were destroyed and covered with debris by Lahiere-Hill's

contractor in January 2007, despite informal understandings that had existed between State employees and Lahiere-Hill's contractor about the nature and location of Lahiere-Hill's previous road construction and rock harvesting activities.

Finally, the Trial Court erred in disregarding new evidence the State attempted to introduce shortly after the deadline for responding to the motion for summary judgment had passed. This evidence was relevant to the public nuisance claim and presented a genuine issue of material fact with respect to the reasonableness of Lahiere-Hill's activities in light of their impact to the ecology of the surface estate and valuable habitat within the CTSP.

Should this Court affirm the Trial Court's judgment and reasoning, it could have enormous adverse consequences for all State-owned land on the Cumberland Plateau and elsewhere that does not include mineral rights. And it could potentially vitiate the public's rights to recreational and cultural use and enjoyment of lands dedicated to public use.

ARGUMENT

I. THE TRIAL COURT ERRED IN CONSTRUING THE MINERAL RESERVATION IN THE 1951 DEED TO ENCOMPASS SANDSTONE AND SURFACE MINING.

A. Mineral Reservations in a Deed must Be Strictly Construed Against the Grantor, and the Intention of the Original Parties Should Be Arrived at in Light of Accompanying Circumstances and The Parties' Conduct Shortly Thereafter.

In addressing the initial inquiry of the State's declaratory judgment action, that being whether the scope of the mineral reservation in the 1951 deed encompassed stone and rock, the Trial Court pronounced the question to be strictly a legal one and erroneously concluded that the language of

the deed's reservation was plain and unambiguous in this regard. (Vol. IV, 514-515, 561). The Trial Court's interpretation of the deed presents a question of law, and, therefore, the scope of review on appeal is *de novo* with no presumption of correctness in the trial court's decision. *State v. Levandowski*, 955 S.W.2d 603, 604 (Tenn. 1997).

The 1951 deed from Durham Land Company and the Hoffmans to Efim Golodetz incorporated a mineral reservation excepting out the following interest, in pertinent part:

> all mines, coal, iron, oil, gas, and other minerals, of whatsoever kind or character in and under said above-described property, with full and free power to take all usual, necessary and convenient means for searching for, mining, working, getting, preparing, carrying away, and disposing of said mines and minerals. . . .

(Vol. I, 31-32). Construing this language as a whole, including the order of the initial resources listed, the Trial Court incorrectly assumed that the phrase "other minerals, of whatsoever kind or character" necessarily included rock and sandstone. (Vol. IV, 515). But this was, at best, a flawed syllogism, since it ignores the intentions of the original parties and the accompanying circumstances.

The Trial Court erred in interpreting the mineral reservation, first, by relying primarily on Tennessee cases construing marital and business contracts (Vol. IV, 514, 560), and by ignoring the legal standard that applies in cases construing mineral reservations in deeds. It is a well established rule in Tennessee that deeds of conveyance, like other contracts, are to be enforced according to the expressed intentions of the parties thereto. *Waddle v. Lucky Strike Oil Co.*, 551 S.W.2d 323, 326-327 (Tenn. 1977); *P.M. Drilling, Inc. v. Groce,* 792 S.W.2d 717, 719 (Tenn. Ct. App.), *appeal denied,* (1990). But the Tennessee Supreme Court has also opined that mineral reservations in a deed must be "construed most strictly against the grantor." *Campbell v. Tennessee Coal, Iron & R.*

Co., 265 S.W. 674, 676 (Tenn. 1924); *cf. Cellco Partnership v. Shelby County,* 172 S.W.3d 574, 596 (Tenn. Ct. App.), *appeal denied,* (2005) (holding that easement of a grant must be strictly construed and grant taken most strongly against grantor). Other jurisdictions are in accord with this precept of construing mineral reservations strictly against the grantor, particularly when the language of the reservation may be susceptible to more than one interpretation. *See, e.g., Phipps v. Leftwich*, 216 Va. 706, 222 S.W.2d 536, 539 (1976); *Stewart v. Chernicky*, 439 Pa. 43, 266 A.2d 259, 264 (1970); *McCombs v. Stephenson*, 154 Ala. 109, 44 So. 867, 869 (1907).

Regrettably, it cannot be ascertained with absolute certainty what the original parties to the deed herein intended in 1951, since there are no witnesses available and no records extant other than the deed itself. But under Tennessee law, while the language of the deed should control, the intention of the instrument can be arrived at "from the language of the instrument read in the light of surrounding circumstances." *Manhattan Savings Bank and Trust Co. v. Bedford,* 161 Tenn. 187, 30 S.W.2d 227, 229 (1930) (citing *Dalton v. Eller*, 153 Tenn. 418, 284 S.W. 68, 70 (1926)); *cf Belcher v. Elliot,* 312 F.2d 245, 248 (6th Cir. 1962) (holding that conduct of parties after execution of a deed may be considered as an aid to its interpretation).

The Tennessee Supreme Court has recognized that when interpreting contracts, even those that may appear unambiguous on their face, it is appropriate to consider the parties' conduct and accompanying circumstances. In *Hamblen County v. City of Morristown*, 656 S.W.2d 331, 334 (Tenn. 1983), the Court cited with approval the following passage from *Restatement of Contracts*, § 235(d) and Comment:

> The court in interpreting words or other acts of the parties puts itself in the position which they occupied at the time the contract was made. In applying the appropriate standard of interpretation even to

> an agreement that on its face is free from ambiguity it is permissible to consider the situation of the parties and the accompanying circumstances at the time it was entered into-not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning to be given to the agreement.

Similarly, other states have focused on the surrounding circumstances when construing a mineral reservation in order to ascertain the original parties' intentions. *See, e.g., Besing v. Ohio Valley Coal Co., Inc. of Kentucky*, 155 Ind. App. 527, 293 N.E.2d 510 (1973). In *Besing*, the court found the phrase "oil, gas and other minerals" in a reservation to be ambiguous and not inclusive of coal deposits. 293 N.E. 2d at 512. Specifically, the court found that the phrase "and other minerals" did not encompass coal, since the mineral estate owner (Besing) was engaged in the purchasing and selling of oil and gas leases, not coal interests, before the 1940 conveyance was executed. *Id.* at 513.

The record below does establish that, as mineral owners in the 1960's and 1970's, the Lahieres and Elmer Hill were primarily interested in developing the coal reserves on their property in Hamilton County. (Vol. V, 57-58). Defendant offered no proof that these coal reserves were ever extracted through strip mining or surface mining. Indeed, the Tennessee legislature passed a law in 1977 respecting mineral estates in coal that provided, in pertinent part:

> In any instrument *heretofore* or hereafter executed purporting to sever the surface and mineral estates which does not describe the manner or method of mineral extraction *in express and specific terms,* it shall be presumed that the intention of the parties to the instrument was that the minerals be extracted only in the principal manner and method of mineral extraction prevailing in Tennessee at the time the instrument was executed.

Tenn. Code Ann. § 66-5-102 (previously codified as Tenn. Code Ann. § 64-511) (Emphasis supplied). Thus, the General Assembly set out a test traditionally applied in contract law: the parties

are presumed to have contemplated extraction by the principal manner prevailing at the time. *See Phipps v. Leftwich*, 216 Va. 706, 222 S.W.2d 536, 540-541 (1976). Moreover, had the Lahieres or Hill sought to surface mine coal after 1977, the laws in Tennessee would have required that they produce both written evidence of their right to surface mine and written consent from the surface estate owner. Tenn. Code Ann. § 59-8-308(k) (repealed 1984).[5]

While the State admits that surface mining (and quarrying) are commonly accepted methods for extracting sandstone, the State does not concede that the 1951 mineral reservation from Durham Land Company and the Hoffmans to Efim Golodetz contemplated either sandstone or surface mining generally. Beyond the fact that the Lahieres and Elmer Hill were developing coal reserves on the subject property in the 1960's and 1970's (Vol. V, 57-58), the record also reveals that many of the Hamilton County tracts being conveyed and reserved in 1951 by Durham and the Hoffmans were originally conveyed to them by: Durham Coal & Iron Company (Vol. I, 27, 31); Hamilton Coal Company; and Durham Coal & Iron Company (Vol. I, 33). As argued above, there was no proof offered in the Trial Court that Durham, Hoffman, or any of their predecessors in title were ever extracting coal, or any other mineral, in Hamilton County through the use of surface mining methods. And the record certainly does not show that any of Lahiere-Hill's predecessors in title were mining stone in 1951 in Hamilton County.

The language in the 1951 mineral reservation that is the subject of this action should be compared to the language of the mineral estate at issue in *Campbell v. Tennessee Coal, Iron & R. Co.*, 265 S.W. 674 (Tenn. 1924), which provided as follows:

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[5] This law was replaced by the Coal Surface Mining Act of 1987, Tenn. Code Ann. §§ 59-8-401 to 59-8-421.

> Reserving from said sale *all mines or minerals* contained or imbedded in *or on* said tract; . . . with the right to make excavation, to erect works or machinery for the purpose of manufacturing such minerals as may be found *on or contiguous to* said land, . . . and to do *any and everything necessary* to be done for the successful mining and manufacturing or exporting any minerals. . . *but agreeing to pay said Lyle a reasonable compensation for any actual damage that may be done to the surface* of the land.

(Emphasis supplied). Despite the breadth of the mineral reservation at issue in *Tennessee Coal* and despite its inclusion of a clause requiring payment of compensation for damages to the surface, the Tennessee Supreme Court nonetheless concluded that limestone was not intended by the original parties to be included in this mineral estate. *Id.* at 677. This was so, the Court held, even though the word "minerals" might be construed to include limestone. *Id.* In so holding, the Court underscored that "[i]t is unnecessary to cite authorities for the proposition that reservations in a deed must be construed most strictly against the grantor." *Id.* at 676.

In addition to its failure to construe the language of the mineral reservation strictly against the grantor, in accordance with Tennessee law, the Trial Court abused its discretion in interpreting the scope of the 1951 mineral reservation by consulting more recently enacted statutes in Tennessee and Attorney General Opinions interpreting those statutes. (Vol. IV, 520-521). These more contemporary Attorney General Opinions can offer no insight into the intentions of the parties to the decades-old deeds that are at issue herein, because the opinions interpret mineral statutes that were enacted in the 1980's. This lawsuit is about the mineral estate created in 1951 and conveyed to Joseph Lahiere in 1962 through instruments created *by and between private parties* well before Tennessee's mining laws were enacted.

Nonetheless, the Trial Court appeared to find some solace in opinions offered by the

Attorney General and Reporter on the definition of "mineral" and "sandstone" in various mineral severance tax statutes. In particular, the Trial Court cited a 1997 opinion discussing whether "dirt" or "soil" should be included in a 1982 Private Act's definition of "all other minerals that are severed from the earth." (Vol. IV, 521). In attempting to discredit the scientific opinion on the definition of a "mineral" offered by the State's expert witness, the Trial Court noted that "the Attorney General adopted a traditional meaning of the word 'mineral,' as opposed to a super-scientific meaning." (Vol. IV, 521).

It appears to be this 1997 interpretation of a "traditional" meaning, encompassing any material having commercial value, that the Trial Court attempted to engraft onto the 1951 mineral reservation at issue herein. Rather than interpreting the 1951 mineral reservation in light of surrounding circumstances, including the conduct of some of the parties shortly thereafter, the Trial Court inferred from these more recent laws, and opinions interpreting those laws, that the parties to the original deed in 1951 must have intended to include sandstone within the scope of the reservation, as well as virtually any raw material that could be removed from the surface for commercial use. And this rationalization was provided *after* the Trial Court had concluded that the language of the 1951 reservation was clear and unambiguous.

In 1962, Durham conveyed "all mines, minerals, and mining rights *under* the surface" to certain of its tracts in the third civil district of Hamilton County to Joseph Lahiere. (Vol. II, 258) (Emphasis supplied). Similarly, in 1963, Durham and Mary Glen Land Company conveyed "all mines, minerals, and mining rights *under* the surface" to certain tracts to Joseph Lahiere and his wife, Josephine Lahiere. (Vol. II, 264-268) (Emphasis supplied). Both these instruments also reflected that they included "all powers, privileges . . . and all other rights of whatsoever extent, kind

and character" as reserved by Durham in its earlier instruments, including the deed to Efim Golodetz recorded at Book 1064, Page 46. (Vol. II, 262, 275).

While these subsequent grants to the Lahieres included the very same mineral interest that was reserved by Durham in 1951, Durham, as the original grantor, must have had some reason for employing the phrase "under the surface" in describing these same mineral rights in 1962 and 1963. The language in the original reservation in 1951 referred to minerals "*in and under* said above described property." (Vol. I, 31, 32, 37) (Emphasis supplied). None of the deeds from Durham reserved minerals "on" the property. The limited use of prepositions is significant. Durham must have thought it had reserved only minerals that could be accessed from underground and not from the surface.

Some jurisdictions, in interpreting the scope of a mineral reservation, have focused on whether the language employed is "peculiarly applicable" to underground mining. *See, e.g., Skivolocki v. East Ohio Gas Company*, 38 Ohio St. 2d 244, 313 N.E. 2d 374, 378 (1974); *Stewart v. Chernicky*, 439 Pa. 43, 266 A.2d 259, 264 (1970). In both *Skivolocki* and *Chernicky* the deeds reserved the right to mine coal "in and under" the property, and the courts declined to hold that the mineral rights encompassed the strip mining method. 313 N.E. 2d at 378; 266 A.2d at 264.

All of these factors - the Lahieres' and Hill's focus on developing coal, the nature of the business in which Durham's and Hoffman's predecessors in title were engaged, the limiting prepositions Durham used in its conveyances, and the lack of proof regarding either the use of surface mining or any earlier mining of sandstone - suggest that subterranean or deep mining was the prevailing method of extraction used in 1951 in Hamilton County. And all of these factors are the type of "surrounding circumstances" that the Trial Court failed to consider, but should have

considered. This Court should consider these factors and find, as a matter of law, that the 1951 mineral reservation does not encompass sandstone or any form of surface mining.

B. Where Mineral Rights Have Been Severed from the Surface, the Surface Owner Retains a Right to Surface Support, Unless a Waiver of That Right Has Been Clearly Expressed in the Deed.

The Trial Court also erred by inferring that the State's predecessor in title in 1951 had essentially waived its right to surface support under the original mineral reservation. This inference is found in the Trial Court's expansive reading of Lahiere-Hill's "broad private rights reserved in the 1951 deed reservation." (Vol. IV, 569). Again, this liberal construction flies in the face of Tennessee jurisprudence and the majority of jurisprudence construing mineral reservations.

In *Campbell v. Campbell*, 199 S.W.2d 931, 933 (Tenn. Ct. App. 1946), *appeal denied,* (1947), the court construed a deed that contained the clause "and the mineral of all kinds being reserved with sufficient privilege to operate and market the same." The parties in *Campbell* did not dispute that underlying coal reserves on the property were encompassed in this mineral reservation, but the plaintiff surface owners filed suit after the defendants' mining activities resulted in subsidence damage to the surface. The court held that the deed did not reserve to the grantor "the right to destroy the surface in the mining of coal." *Id.* at 934. It is unclear what method of mining the defendants were employing in *Campbell*, but the decision references the fact that the defendants had blasted out some supports that were left from previous mining operations twenty years earlier and that this caused the subsidence to occur. *Id.*

The court in *Campbell* cited with approval the following statement from 36 Am. Jur. 408, 409, *Mines and Minerals*, § 187:

> The owner of the surface may waive or part with his or her right to surface support, as where he grants the mineral estate and by apt words in the deed parts with or releases his right to such support. The waiver of surface support may be inferred from the terms of the grant or reservation of the minerals, as where it contains an *agreement to pay for damages to the surface*. However, such a conveyance or waiver should not be implied unless the language of the instrument or conveyance is appropriate therefor and clearly indicates such to be the intention of the parties, *and where minerals are granted or reserved in the most general terms, still a reasonable support must be left for the surface, and there is in every such case a prima facie inference that the grant or reservation is made in such a manner consistent with the retention of this right.*

199 S.W. 2d at 933. (Emphasis supplied).

There is no express grant of surface mining methods in the 1951 deed herein, nor an express agreement to pay for damages to the surface, such as was found in the deed at issue in *Campbell v. Tennessee Coal, Iron & R. Co.*, 265 S.W. 674 (Tenn. 1924). Even in *Tennessee Coal,* our Supreme Court was unpersuaded by the damage clause and held, instead, that limestone's inclusion in the mineral estate would result in destruction of the surface rights. This is apparent from the following statement:

> If this reservation be construed to include limestone, it destroys the conveyance, for by quarrying the limestone the entire surface would be made way with. This being wholly a limestone proposition, it is most reasonable to suppose that Mr. King would have reserved same by *express terms*, had such been his intention.

Id. at 676 (Emphasis supplied).

More recently, in *Doochin v. Rackley*, 610 S.W.2d 715 (Tenn. 1981), the Tennessee Supreme Court declined to construe a mineral estate as including the right to remove coal by strip mining,

even though the mineral interest expressly included coal in the deeds. One of the deeds at issue in *Rackley* reserved:

> all oil, gas, coal and any other minerals or mineral substances *on or under* the said tract, with full rights to enter thereon, explore for, mine or otherwise procure any such minerals by *any proper or necessary means with all necessary rights and ways to remove* such products therefore.

Id. at 716. (Emphasis supplied). This was broad language indeed, particularly since it contained the preposition "on" and it allowed for extraction "by any proper or necessary means with all necessary rights and ways to remove such products." Yet the Court in *Rackley* still remarked that the deeds, which were executed in the 1920's and 1930's, did "not specify the methods of extracting minerals that were contemplated." *Id.* at 716-717. That in itself suggests that the Court was following its own rubric of strict construction against the grantor. The court went on to note that strip mining was unknown in White County until the 1940's and then commented at length on the hazards of strip mining, which it declared "incompatible with the surface owner's enjoyment of his estate." *Id.* at 717.

In *Sherrill v. Erwin*, 220 S.W.2d 878, 881-882 (Tenn. Ct. App. 1948), *appeal denied*, (1949), the only mineral law case relied upon by the Trial Court, the court upheld the right of a mineral owner to remove coal by strip mining, because the language in the deed at issue expressly included the stripping method. Significantly, however, the Court of Appeals in *Sherrill* also limited the mineral owner's right to use the surface to activities and uses that were "strictly and reasonably necessary." *Id.* at 881.

The 1951 mineral reservation at issue herein does not contain any provisions expressly

contemplating surface mining, or even the mining of stone. Moreover, defendant never produced any evidence, demonstrative or testimonial, to support its contention that the mineral estate created by Durham Land Company and later conveyed to Joseph Lahiere was intended by the grantors to include stone or any methods for surface mining any mineral.

The same sort of surface destruction and/or waiver test that Tennessee courts have employed has been adopted in a myriad of other states, with some going even further to protect the rights of surface owners. In *Brown v. Crozer Coal & Land Co.,* 144 W. Va. 296, 107 S.E.2d 777 (1959), the West Virginia Supreme Court construed certain deeds containing mineral reservations that allowed the mineral owner to remove minerals in "the most approved method" and reserved all necessary and useful rights for mining. Nonetheless, the court held that the mineral owners did not have the right to engage in auger mining of coal, which was not in use at the time the deeds were executed. *Id.* at 786. Moreover, the court held that the surface owners had not only a right to subjacent support, but an "equal right to hold intact the thing to be supported, i.e., the surface," in the absence of a clearly expressed intention to the contrary. *Id.*

In *Christensen v. Chromalloy American Corporation*, 99 Nev. 34, 656 P.2d 844 (1983), a corporate mineral owner brought an action against landowners seeking to restrain them from interfering with its open-pit mining of barite. The landowners counterclaimed for trespass, conversion, and nuisance. The mineral clause at issue was quite expansive, reserving to the grantor all rights to "coal, oil, gas and other minerals of every kind and nature whatsoever existing upon beneath [sic] the surface of, or within said lands ." *Id.* at 845. But the court, after reviewing cases from other jurisdictions, including Tennessee, held that the language of the mineral reservation was ambiguous, because '[t]he reservation does not clearly establish that the parties intended to allow

open-pit or strip mining of the 'other minerals' referred to." *Id.* at 848. The court further found that the landowners were suffering irreparable harm to their surface estate as a result of the open-pit mining operations. *Id.*

In *Acker v. Guinn,* 464 S.W.2d 348, 350 (Tex. 1971), the deed at issue purported to convey an interest in oil, gas, and "other minerals in and under" the land. The mineral owner argued that his interest under the 1941 deed included the right to mine iron ore through strip-mining. But the Texas Supreme Court chose to construe the phrase "other minerals" strictly, concluding that surface minerals that were subject to extraction by open-pit mining belonged to the surface estate owner. *Id.* at 352. Thus, the court in *Acker* employed its own version of a waiver/surface destruction test, stating:

> The parties to a mineral lease or deed usually think of the mineral estate as including valuable substances that are removed from the ground by means of wells or mine shafts. This estate is dominant, of course, and its owner is entitled to make reasonable use of the surface for the production of his minerals. It is not ordinarily contemplated, however, that the utility of the surface for agricultural or grazing purposes will be destroyed or substantially impaired. *Unless the contraryintention is affirmatively and fairly expressed, therefore, a grant or reservation of 'minerals' or 'mineral rights' should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate.*

Id. (Emphasis supplied).

Almost ten years later, the Texas Supreme Court further amplified its *Acker* decision in *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980), and imposed an even more rigorous surface destruction test, when it construed a clause reserving an interest in "oil, gas and other minerals." The court concluded that this reservation did not capture surface minerals that had to be mined by methods that destroyed the surface. *Id.* at 747. The court explained that if "the deposit lies near the surface, the

substance will not be granted or retained as a mineral if it is shown that any *reasonable* method of production would destroy or deplete the surface." *Id.* (Emphasis supplied).

The courts in Ohio have taken an equally protective view of surface owners' rights. In *Skivolocki v. East Ohio Gas Company,* 38 Ohio St. 2d 244, 313 N.E.2d 374 (1974), the court considered whether a mineral owner acquired the right to strip mine coal under a 1901 deed, which included a clause imposing a charge on the mineral owner for use of the surface estate. The court commented that strip mining causes "total disruption of the surface estate" and, therefore, traditional rules intended to ensure the mutual enjoyment of the mineral and surface estates could not be "blindly applied." *Id.* at 377. The court ultimately held that the right to strip mine was not incident to ownership of a mineral estate, since strip mining was "totally incompatible with enjoyment of the surface estate." *Id.* at 378.

Closer to home, the Virginia Supreme Court invoked a form of surface destruction test in *Phipps v. Leftwich*, 216 Va. 706, 222 N.E.2d 536 (1976), when it construed a 1902 deed conveying rather broad mineral rights, including coal. There, the mineral owners asserted that the reservation in the deed allowed them to remove coal by the strip mining method. The court, however, finding no explicit right in the deed's language, disagreed, stating:

> We have been unwilling to construe a deed so as to hold that the owner of a mineral estate has the right to destroy the surface, *unless such right has been expressed in unmistakable plain terms.*

Id. at 540. (Emphasis supplied). *See also Smith v. Moore,* 172 Colo. 440, 474 P.2d 794, 795 (1970); *cf. Benton v. U.S. Manganese Corporation*, 229 Ark. 181, 313 S.W.2d 839, 842 (1958) (holding mineral owner had right to engage in open pit mining, but was liable to surface owner for damages for complete destruction of the surface).

In almost every one of these cases, the courts adopted a strict construction of the mineral reservation and found, as a matter of law, that surface mining was not contemplated, because it was not affirmatively stated therein. The cases above are just a sampling, but they illustrate two clear trends: (1) courts are placing a heavy burden on the mineral owner to demonstrate that the right to surface mine in any form was expressly intended by the original parties; and (2) a consistent reluctance on the part of courts in Tennessee and elsewhere to construe mineral reservations so broadly that the surface rights become meaningless and the mineral rights swallow up the grant.

But the Trial Court herein did just that when it summarily inferred that the State had essentially waived its right to surface support under the 1951 deed. It completely disregarded the holdings and reasoning in a line of Tennessee cases that had strictly construed mineral clauses and carefully scrutinized both the language employed and the surrounding circumstances in order to ascertain the original parties' intentions. Once the Trial Court had effectively extirpated the State's surface rights in this way, its elementary treatment of the State's public nuisance theory was almost a foregone conclusion. But this, too, as argued below, was error.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING THE STATE'S PUBLIC NUISANCE CLAIM AND IN DENYING THE STATE'S MOTION TO ALTER OR AMEND JUDGMENT IN THIS REGARD.

In its original verified complaint, the State advanced a public nuisance claim based on Lahiere-Hill's stone harvesting operations in the CTSP. (Vol. I, 8, 19-21). The State also submitted evidence at the hearing on its motion for temporary injunction by way of Ranger Andrew Wright's testimony (Vol. V, 27-57), photographs (Ex. 2), and a DVD (Ex. 3) presented to the Trial Court on

March 21, 2007. But in its Memorandum Opinion and Order addressing Lahiere-Hill's motion for summary judgment, the Trial Court expressly rejected the State's public nuisance theory, because "[t]he record reflects the defendants have been reasonable, and legal, with regard to their activities." (Vol. IV, 525). Significantly, the Trial Court offered no specific findings to explain why defendant's stone removal activities and methods of extraction were "reasonable" in light of the public's interest in maintaining as much of the integrity of the surface estate and the park's ecosystem as possible.

The Tennessee Supreme Court defines a public nuisance as "interference with the public's use and enjoyment of a public place or with other common rights of the public." *Metropolitan Government of Nashville and Davidson County v. Counts,* 541 S.W.2d 133, 138 (Tenn. 1976). A "park" is defined as "land . . . acquired . . . and administered by the state for the recreational and cultural use and enjoyment of the people." Tenn. Code Ann. § 11-3-101. "The key element of any nuisance is the reasonableness of the defendant's conduct under the circumstances." *Sadler v. State* 56 S.W.3d 508, 511 (Tenn. Ct. App.), *appeal denied*, (2001). Defendant's stone harvesting operations in the CTSP meet the definition of a public nuisance, because these acts are unreasonably interfering with the public's use and enjoyment of the park.

During the hearing on the State's motion for temporary injunction on March 21, 2007, the State offered uncontested proof of damage to the surface estate in the CTSP by defendant's activities through the testimony and affidavit of Ranger Andrew Wright (Vol. V, 27-56; Exhibit 2), as well as photographic and digital video evidence. (Exs. 2 and 3). Mr. Wright testified that on January 19, 2007, he observed defendant's contractor using much heavier equipment, dozers and backhoes, than had previously been used by defendant in the park. (Vol. V, 33). With respect to the damage to the surface estate, both on and off the trail proper, Mr. Wright testified:

Q Could you just briefly tell the Court what you observed during the inspection.

A I observed a fairly large operation. The road in was wide enough for the bulldozer and the backhoe that was down in the area as well as the dump trucks. There was — The road was bermed on one side with debris and dirt that had been tossed off this side; and on the uphill side, they had broken up the surface with the backhoe to retrieve the rocks.

. . .

Q And could you tell how much of the trail had been disturbed?

A My estimate was about 50 to 100 yards.

Q Now had you observed the contractors prior to 2007? Had you observed them using heavy equipment like this before?

A Not of that size, no. Mr. Hendon's operation was much smaller.

Q In what sense?

A He had a skidder that really wasn't much bigger than a large tractor, rubber tired. The new operation has large dozers and backhoes. Mr. Hendon's operation was basically just kind of busting the surface loose as opposed to actually excavating down into --

Q Did you and Mr. Finley take photographs on January 19th of what you observed?

A Yes.

(Vol. V, 33). Lahiere-Hill's contractor, Marty Daggett, testified that he had to build up the road in order to access the area where the stone was to be removed and that sometimes, topsoil, vegetation, and trees had to be removed from the surface in order to dig down to where the sandstone is located. (Vol. V, 77-78).

The ranger also testified that there are two rare and/or threatened plant species that populate this portion of the CTSP in Hamilton County (Vol. V, 29-30) not far from where defendant's contractor was working (Vol. v, 47-48) but that the plants had a very narrow growing season of May to June, so they were dormant during the winter. (Vol. V, 47). The ranger had marked on a map for the defendant's contractor the area where the threatened *scutellaria montana* was believed to be located. (Vol. V, 50). Mr. Wright testified that defendant's contractor had indicated to him that he intended to be harvesting stone in the area for at least another year and, perhaps, three years. (Vol. V, 41). Finally, Mr. Wright testified that, as a result of the damage to the trail in January, his superiors had advised him to close this portion of the CTSP to the public. (Vol. V, 41-42).

The potential continuing nature of the public nuisance was made apparent from the contractor's admission to park personnel that he intended to be harvesting stone in the area for at least another year and, perhaps, three years. (Vol. V, 41; Ex. 4). With respect to the methodology of harvesting stone, Lahiere-Hill's contractor also testified that "[y]ou can't tell what's there until you start digging. After you start digging into it, then you can get down under it and see what's in the dirt and under the vegetation." (Vol. V, 77). He conceded that the stones he desired to access were often covered with topsoil, vegetation, and trees. (Vol. V, 78). All of this must have contributed to the Trial Court's decision to issue a limited temporary injunction on April 4, 2007.

In its motion for summary judgment, Lahiere-Hill offered no affidavits or additional proof, choosing to rely instead on all of the testimony and demonstrative evidence proffered at the temporary injunction hearing back in March 2007. (Vol. III, 370-372). Defendant focused its summary judgment efforts solely on establishing, as a matter of law, that stone was a "mineral" within the meaning of the 1951 deed.

The evidence introduced at the temporary injunction hearing showed unmistakably the damage visited upon the CTSP and the trail proper by Lahiere-Hill's contractor in January 2007. While it is true that the State did not offer additional evidence to buttress its public nuisance claim when it responded to the summary judgment motion, the above facts were never controverted by Lahiere-Hill. Furthermore, the State expressly denied paragraph 13 of Lahiere-Hill's Statement of Material Facts, as follows:

> 13. Lahiere-Hill has the right under its mineral estate to do "whatever is reasonably necessary to obtain the sandstone dimension stone that it is mining from the Property." April Opinion at p. 12.
>
> RESPONSE: While the Court's opinion of April 4, 2007 speaks for itself, it states a legal conclusion, rather than a material fact, that has not been ultimately decided. Plaintiffs deny the legal conclusion stated in paragraph 13.

(Vol. III, 429). The reasonableness of the defendant's activities was *not* a question of law to be decided by the Trial Court but a question of fact for which a genuine issue had been created by the evidence presented. Summary judgment was, therefore, improper.

After the Trial Court granted the defendant's motion for summary judgment, the State filed a motion to alter or amend judgment, asking the Trial Court to consider additional evidence in support of the public nuisance claim that was produced after the State responded to defendant's motion for summary judgment. (Vol. IV, 528-552). This motion was prompted in large part by the Trial Court's failure to explain its finding that "defendants have been reasonable, and legal, with regard to their activities." (Vol. IV, 525).

Specifically, the State asked the Trial Court to consider the written report or "Memoranda"

documenting a field inspection of the subject area in the CTSP conducted on July 19, 2007, by Kevin Fitch and a team from the Tennessee Department of Environment and Conservation's (TDEC's) Division of Natural Areas. This report further shows that there are genuine issues of material fact concerning subsidence of the surface estate, as well as issues concerning habitat destruction resulting from defendant's stone harvesting activities. It was provided to Lahiere-Hill on or about August 1, 2007, as a late-filed exhibit to the deposition of Reggie Reeves, and it was attached by defendant as Exhibit B to its motion in limine filed with the Trial Court on August 10, 2007. (Vol. IV, 451-494). The Trial Court never ruled on Lahiere-Hill's motion in limine, instead determining that it was moot in light of its decision on the motion for summary judgment on August 17, 2007. (Vol. IV, 525). The information contained in this field inspection report is directly relevant to the State's public nuisance cause of action and itself creates material issues of fact as to the reasonableness of Lahiere-Hill's stone removal methods.

The State met the criteria set out in *Harris v. Chern*, 33 S.W.3d 741, 744 (Tenn. 2000), for submitting additional evidence in support of a motion to alter or amend summary judgment. These factors include: 1) the movant's efforts to obtain the evidence in order to respond to summary judgment; 2) the importance of the newly submitted evidence to the moving party's case; 3) the explanation offered by the moving party for the failure to submit the evidence in responding to summary judgment; 4) the likelihood that the nonmoving party will suffer unfair prejudice from the introduction of the evidence at this juncture; and 5) any other relevant factor. *Id.; Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003). Indeed, the State submitted an affidavit in support of its motion to alter or amend judgment that addressed these five factors. (Vol. IV, 545-548).

The Trial Court erred in finding that the State had failed to satisfy the second and fourth

criteria set out in *Chern*. Specifically, the Trial Court held that the new evidence proffered by the State, namely the "Fitch" inspection report, was "not helpful to the State's case." (Vol. IV, 570). It also wrongly concluded that submission of the new evidence would unfairly prejudice Lahiere-Hill. (Vol. IV, 571-574).

The written report of Kevin Fitch and his team is important to the State's public nuisance cause of action because it underscores the ecological impact of defendant's stone harvesting activities on the surface estate, which is owned and managed by the State for the benefit of the public's use and enjoyment. The report reflects that the rock, or stone, extraction activities have resulted in surface environments being removed or destroyed without soil/slope stabilization or revegetation, "mass slope subsidence," stream sedimentation, and removal of extensive canopy, including loss of hemlock and its habitat associations. (Vol. IV, 534-544). Of course, all of these consequences, in turn, cause a loss of desirable viewsheds and natural environments for the general public, not to mention loss of habitat for plant and animal species.

Having issued limited injunctive relief to the State in April 2007 without the benefit of this eleven page report by State biologists, naturalists, and ecologists, the Trial Court then, five months later, neutralized the State's public nuisance claim by deciding that the reasonableness of Lahiere'Hill's activities was essentially a question of law and one it had already ruled upon. In its Memorandum Opinion and Order entered October 12, 2007, the Trial Court stated:

> . . . this court held as a matter of law in the August 17, 2007 Opinion that the stone harvesting practices Mr. Daggett used on Lahiere-Hill's behalf comported with the language in the 1951deed reservation. . . . Applying the plain, ordinary meaning of the deed's language, the court found that 'all usual, necessary and convenient means for searching for, mining, working, getting, preparing, carrying away, and disposing of said mines' was sufficiently broad to encompass surface

> mining. . . . Further, the court found that this method is the easiest or most convenient way to harvest sandstone. . . .

(Vol. IV, 567). Then, in an effort to downplay the scientific nature of the State's report, the Trial Court made the following pronouncement:

> While the destruction of wildlife and enjoyable hiking trails is disheartening to the court, the ultimate scientific effects of the stone harvesting have little bearing on whether the activity is a public nuisance when the party harvesting the materials has a private right to do so that pre-dates the State's ownership of and the public's interest in the land.

(Vol. IV, 571). But under both the terms of the deed and the definition of public nuisance, the reasonableness of Lahiere-Hill's actions is the question - a question to which the inspection report is most relevant.

With respect to the issue of unfair prejudice to defendant, the Trial Court reasoned that permitting the introduction of the inspection report would be tantamount to allowing the State to make "a new legal argument to defend its claims from summary judgment." (Vol. IV, 571). But the State was merely attempting to introduce new *evidence* to support an existing legal argument, and the Tennessee Supreme Court has recognized the circumstances under which that can be accomplished. *See Chern*, 33 S.W.3d at 744. Nonetheless, the Trial Court, in circular fashion, insisted that, because the State had not properly addressed the public nuisance argument in its initial response to Lahiere-Hill's summary judgment motion, it would be foreclosed from doing so in a motion to alter or amend judgment. (Vol. IV, 571-574).

No unfair prejudice would result to defendant from a consideration of the State's written report from the July 19, 2007, inspection, because the State alerted Lahiere-Hill on that very date,

during the course of Reggie Reeves' deposition, that members of the Natural Areas staff were in the process of pulling together information to underscore the ecological significance of the subject area and that the information "could be" offered at the trial of this matter. (Vol. 549-552).

As stated above, park land such as the CTSP is "dedicated to and forever reserved and administered by the state for the recreational and cultural use and enjoyment of the people." Tenn. Code Ann. 11-3-101. But Lahiere-Hill's ongoing stone harvesting activities, including their operation of heavy equipment, which has already resulted once in the destruction of a portion of the CTSP, are preventing members of the public from safely and beneficially enjoying the aesthetic, cultural, and recreational values of this unique surface environment. (Vol. IV, 534). In short, defendant is unreasonably interfering with the public's enjoyment of its surface rights, and there is nothing in the language of the 1951 mineral reservation created by Durham Land Company and the Hoffmans that waives the State's right to surface support. The Trial Court erred in not only granting summary judgment to the defendant on the State's public nuisance claim, but also in denying the State's motion to alter or amend this judgment.

CONCLUSION

For all the foregoing reasons, this Court should reverse the judgment of the Trial Court that the 1951 mineral reservation encompasses sandstone and any form of surface mining.

Alternatively, this Court should reverse the Trial Court's award of summary judgment on the State's public nuisance claim, restore the temporary injunction Order of April 4, 2007, and remand this case to the Trial Court for trial on that claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Brief of Appellants has been served upon the following via first Class U.S. Mail, postage prepaid, on this 15th day of February, 2008:

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